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IN THE

Supreme Court of the United States

October Term, 1966

No. 447

FRANCIS ROBILLARD, LEROY SNOWDEN and JOHN WRENN,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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Opinions Below

No opinions were delivered in the Courts below. The order of the Supreme Court of the State of New York, Appellate Term, First Department, affirming the convictions of petitioners was decided without opinion.

Jurisdiction

Petitioners seek review of a judgment made and entered by the Supreme Court of the State of New York, Appellate Term, First Department, May 5, 1966. Said judgment affirmed a judgment after trial of conviction against petitioners in the Criminal Court of the City of New York, Part IE, County of New York, on July 29, 1965.

Application for leave to appeal to the Court of Appeals of the State of New York was denied by Judge Stanley H. Fuld of that Court on May 18, 1966. No further resort being available (*People* v. *McCarthy,* 250 N. Y. 358, 361-2), the judgment of May 5, 1966 of the Supreme Court of the State of New York, Appellate Term, First Department, is the decision of the highest court of the state in which a decision could be had.

This Court has jurisdiction herein under 28 U. S. C. 1257(3).

Questions Presented for Review

(1) Whether a conviction for disorderly conduct under a New York statute may stand as a matter of due process of law under the Fourteenth Amendment in the absence of any evidence concerning a disturbance to public tranquillity.

(2) Whether as a matter of due process of law under the Fourteenth Amendment police officers may dress and behave as homosexuals in order to entice others to solicit said police officers for a lewd purpose.

Statutes Involved

§722(8) of the Penal Law of the State of New York (McKinney's Consolidated Laws of New York Annotated, Vol. 39, Part I) provides in pertinent part:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> "(8) frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness."

The Fourteenth Amendment to the Constitution of the United States provides in part:

> "nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioners were tried under §722(8) of the New York Penal Law for having solicited a police officer for immoral purposes. After having entered a plea of not guilty, petitioners were tried and convicted. The only evidence presented by the People was that of the arresting officer, who testified that he entered a bar in the City of New York, ordered a bottle of beer and sat down on a bench. He was then approached by petitioner Robillard who requested a light for a cigarette, which the arresting officer gave him

(R. 9). At this point, petitioners Snowden and Wrenn were introduced to the arresting officer. A conversation ensued with Robillard asking the police officer whether he usually frequented that type of bar; the police officer responded in the affirmative (R. 9). Defendant Wrenn then suggested that the police officer go to a party, to which the officer agreed, and at this juncture lewd solicitations and accompanying physical actions were made by all three petitioners (R. 9-11). This was the extent of the evidence offered by the prosecution and, after cross examination, the prosecution rested.

On cross examination the police officer stated that he had made nine arrests in the previous 15 weeks for similar solicitations (R. 15) and that none of the arrests was for soliciting persons other than police officers (R. 16). He stated that he had conversed with petitioner for 5 to 7 minutes prior to the alleged lewd statements (R. 16), and that he, the officer, was dressed in a pair of white pants, light sneakers and a polo shirt (R. 17). He admitted the scene of the incident was a bar that catered to men (R. 18, 19), that he tried to dress in order to "be in" with the patrons of the bar (R. 18) and that he had not observed any violations of the law by petitioners before he approached them (R. 20).

Petitioners Robillard and Snowden testified in their own behalf and each denied in its entirety the statement made by the police officer (R. 21-42).

Based upon this evidence, the Court found each of the defendants guilty of violating §722(8) of the Penal Law of the State of New York (R. 47).

Defendants Robillard and Snowden were each sentenced to thirty days in the workhouse, execution suspended. Defendant Wrenn was sentenced to thirty days in the workhouse, which sentence has been stayed, upon consent of the People, through August 16, 1966.

Presentation of Constitutional Questions

At the close of the People's case, petitioners moved to dismiss on the ground the People had failed to make out a prima facie case because there was "no evidence in the record that there was any breach of the peace on the part of the defendants" (R. 21). Petitioners asserted this violated their "constitutional right" and cited "*United States* v. *Thompson*, 362 U. S. 199" [*Thompson* v. *Louisville*, 326 U. S. 199] (R. 21). At the close of the entire case, petitioners moved to dismiss on the ground there was "no evidence in the record to convict these defendants" (R. 47).

At sentencing, petitioners moved to set aside the conviction on Fourteenth Amendment grounds because there was "no evidence of any intent to breach the peace or circumstances whereby a breach of the peace might occur," and because the police conduct which "caused the offense * * * constituted entrapment in violation of due process" (R. 51).

Petitioners, on appeal to the Supreme Court of the State of New York, Appellate Term, First Department, reasserted in their brief the claim of deprivation of due

process of law under the Fourteenth Amendment. Both issues: the lack of any evidence of breach of the peace and entrapment were asserted as Fourteenth Amendment due process violations.

The brief was submitted as part of petitioners' moving papers in requesting leave to appeal to the Court of Appeals of the State of New York.

Reasons for Granting Writ

No Evidence of Breach of the Peace

The requirement under §722(8) of proof of intent to cause a breach of the peace, or circumstances whereby a breach of the peace may be occassioned, has been considered and clearly interpreted by the Court of Appeals of the State of New York. *E.g., People* v. *Chesnick,* 302 N. Y. 58, 96 N. E. 2d 87 (1950). In *Chesnick,* the Court held:

> "The key phrase of the statute is 'breach of the peace' and, traditionally, that language means a violation of public order and tranquility (see No. 5 *Words and Phrases,* p. 763 *et seq.;* Black's Law Dictionary [3rd Ed], p. 246; Restatement, Torts, §116; Personal Property Law, §76). The classic definition, in modern times, of 'breach of the peace' is given by *People* v. *Most* (171 N. Y. 423, 429): 'it is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.' 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility' (*Cantwell* v. *Connecticut,* 310 U. S. 296, 308). And so, to constitute 'disorderly con-

> duct' there must be an actual or threatened 'breach of the peace', which, in turn, means a 'disturbance of the tranquility of the People of the state' (*People* v. *Perry*, 265 N. Y. 362, 365)." (302 N. Y. at 60-61, 96 N. E. at 88-89)

Nevertheless, when the Courts of New York have been involved with an alleged homosexual solicitation, no evidence of the statutory breach of the peace element is generally required to convict. *E.g., People* v. *Pleasant*, 23 Misc. 2d 367, 122 N. Y. S. 2d 141 (1953). As one New York court has noted:

> "Ordinary common sense at once suggests that the defendant in this type of case would not entertain any intention to breach the public peace and that to cause such a breach would be just about the farthest thought from his mind. Yet we go right on, as we have been doing as far back as this Court can remember, with this kind of arrest and prosecution. * * *" *People* v. *Feliciano*, 10 Misc 2d 836, 839, 173 N. Y. S.2d 123, 126 (1958)

As in the present case, there generally is no public disturbance. "[N]o solicitor desires a disturbance. This requirement [of an intent to breach the peace] has been treated in various ways by the courts. Some have ignored it; some have presumed it, thereby rendering the breach of the peace language superfluous; and others inquire whether a given solicitation threatens a disturbance." Jacobs, *Decoy Enforcement of Homosexual Laws*, 112 U. Pa. L. Rev. 259, 266 (1963).

> "The majority of homosexual solicitations are made only if the other individual appears responsive

> and are ordinarily accomplished by quiet conversation and the use of gestures and signals having significance only to other homosexuals. Such unobtrusive solicitations do not involve an element of public outrage." *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County* 13 U. C. L. A. L. Rev. 643, 796 (1966).

Due process of law requires proof of every element of the crime charged. In *Thompson* v. *Louisville*, 362 U. S. 199, (1960), this Court, in reversing a conviction under a Kentucky disorderly conduct statute, stated:

> "There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquility of the City of Louisville" (362 U. S. at 205-06).

It is not enough for a Court to presume that a breach of the peace might occur as a result of a spoken solicitation. "A judge's private knowledge, or even 'knowledge by notoriety' * * * not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime." *Garner* v. *Louisiana*, 368 U. S. 157, 175 (1961) (Frankfurter, J., concurring).

Lack of proof of an essential element of the crime raises an important question of due process of law. The importance of the question is underscored by the reluctance of the courts of several states besides New York to require proof of public disturbance when homosexual solicitation activity is prosecuted under breach of the peace statutes. See, 13 U. C. L. A. L. Rev. 643, *supra*.

The Police Activity Constituted Entrapment

Although forty-three states recognize the defense of entrapment, New York is one of the two states that have rejected the defense. *E.g., People* v. *Mills,* 178 N. Y. 274, 70 N. E. 786 (1904); *Note, The Serpent Beguiled Me and I Did Eat. The Constitutional Status of the Entrapment Defense,* 74 Yale L. J. 942, 943 (1965).

When this Court has previously enunciated standards delineating the contours of this defense, it has done so in the exercise of its supervisory jurisdiction over the administration of federal criminal justice. *Sherman* v. *United States,* 356 U. S. 369 (1950); *Sorrells* v. *United States,* 287 U. S. 435 (1932); *cf., United States ex rel. Hall* v. *Illinois,* 329 F. 2d 354 (7th Cir. 1964). One important question presented by petitioners which has never before been decided by this Court is whether the due process guarantees prohibit a State from securing convictions based on evidence acquired through entrapment methods utilized by state law enforcement officials. *Cf., Banks* v. *United States,* 249 F. 2d 672 (9th Cir. 1957); *but see, Banks* v. *United States,* 258 F. 2d 318 (9th Cir.), *cert. denied,* 358 U. S. 886 (1958). The importance of deciding this issue is particularly imperative in the instant case because the defense of entrapment is unavailable in New York.

It as been sixteen years since in *Sherman* this Court attempted to enunciate workable standards defining the outer limits of the entrapment defense. Re-examination of the standards first enunciated in *Sorrells,* and then reaffirmed in *Sherman,* is long overdue. Petitioners respect-

fully submit that standards which seek to discover with whom the intent to commit the crime originated, or whether the criminal conduct was the product of the "creative activity" of law enforcement officials, have proved to be unworkable. The concurring opinions in both *Sorrells* and *Sherman* espouse an alternative, objective test which is more susceptible to uniform judicial administration. That test focuses on whether the police conduct engaged in is repugnant to civilized feelings concerning the proper use of governmental power.

Another important question presented by this petition is whether a special standard for the determination of entrapment is required when the crime charged is a sexual solicitation, and when the detection procedure consists of decoy enforcement. This Court has previously dealt with transactions concerning physical objects; in *Sorrells,* liquor was sold, and in *Sherman,* narcotics. The special entrapment problems which are created when decoys are used to apprehend sexual solicitors have never previously been dealt with by this Court. The *Sherman-Sorrells* tests, focusing on the origin of the intent and the readiness with which the defendant responds, have proved to be inadequate tools for determining what is essentially a question of appropriateness of police behavior. *Cf., Guarro* v. *United States,* 237 F. 2d 578, 581 (D. C. Cir. 1957).

> "The proper test for determining entrapment should focus on whether the proscribed act results from *any* behavior by the decoy which deviates from the conduct of an average man under the circumstances. *Any* dress, language or gestures employed by the decoy to indicate a desire for a homosexual relationship should be prohibited. Though the decoy

> should be permitted to engage in conversation with a suspected homosexual, his deliberate use of language [dress] or gestures that may be construed as a willingness to engage in a prohibited act should not be allowed. 13 U. C. L. A. L. Rev. at 796, *supra*. (Italics supplied.)

The present case presents an appropriate fact pattern for the resolution of all of these important questions. Each of the several elements of the police officer's conduct (as testified to by him): his choice of dress to "be in" with patrons of a bar that "caters to men" (R. 18, 19), his quick rapport which elicited three sexual solicitations after five to seven minutes of conversation (R. 16), and his public permissiveness to petitioner Robillard's rubbing of his thigh with his hand prior to being solicited by petitioners Snowden and Wrenn (Complaint R. 5, R. 10, 11), clearly sets forth the form and manner of the decoy methods used. Challenge to such enforcement methods is rare given the natural desire to diminish the notoriety which attaches to those who would seek to attack such practices. *Cf.*, 13 U. C. L. A. L. Rev. at 691 n. 35 *supra*.

Unless this petition is granted important questions concerning the availability of federal relief against police conduct repugnant to common feelings concerning the proper use of governmental power will remain unresolved, and abhorrent decoy enforcement methods will continue to be used without regard to the due process safeguards of the Fourteenth Amendment.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for writ of certiorari to the Appellate Term of the Supreme Court of the State of New York, First Department, to review a decision of that court, entered May 6, 1966, affirming without opinion, a judgment rendered after a trial by the Criminal Court of the City of New York, County of New York, on July 29, 1965, convicting the petitioners of disorderly conduct [N. Y. Penal Law, §722, subdivision 8]. Petitioners were each sentenced to serve thirty days in the Workhouse; execution of sentence was suspended as to Robillard and Snowden. On May 18, 1966, petitioners were denied leave to appeal to the Court of Appeals of the State of New York (FULD, J.).

The Statute Involved

The relevant portions of Section 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * *
>
> "8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;"

Questions Presented

1. Does mootness command the dismissal of the petition as to Robillard and Snowden?
2. Does the sufficiency of the People's proof in this case present a federal question?
3. Does due process require recognition of the defense of entrapment, and if so, does the police conduct in the present case constitute entrapment?

Summary of Argument

1. The certiorari application of Robillard and Snowden is moot and should therefore be dismissed.
2. Sufficiency of evidence to support a state conviction constitutes a federal question only where there is no evidence whatsoever to support an essential element of the

crime. In this case the People proved every element of the crime. The conviction then fully accords with due process.

3. Petitioners' claim of entrapment presents no foderal question because that defense lacks Constitutional dimension. In any case, even if constitutionally mandated, the police conduct in the present case clearly did not constitute entrapment.

THE EVIDENCE

The People's Case

Patrolman **Anthony De Greise** testified that at about 1:50 a.m. on May 23, 1965, he entered a "very crowded" bar and grill, located at 513 Greenwich Street, City and County of New York (9, 17.)* After ordering a bottle of beer, he sat down on a bench, several feet from a pool table where the three defendants stood (9). As he sat there, drinking his beer, the officer, in plain clothes, was approached by the defendant Robillard who asked him for a cigarette light (9, 11). De Greise rose and lit the cigarette whereupon Robillard introduced him to the other two defendants (9).

Asked by Robillard whether he frequented "this type of bar" the officer stated that he did (10). Wrenn then suggested that De Greise go to a party with them and he assented (10). At this point, about five minutes after he had met the defendants, Robillard said to him, "I think

* References, unless otherwise indicated, are to the typewritten minutes of the trial.

your joint is big enough to fuck me in the ass," and, proceeding to rub his hand on De Greise's thigh, Robillard stated that he "came" three times a night (10, 16). Then Wrenn stated, "I think I would like to beat [him] on the ass and boy would I make his ass red" (10). Pressing his knees against the officer's, Wrenn added, "I will come all over you" (10). "When I have you," asserted Snowden, "I just want to suck and fuck. I don't go for that beat shit" (10).

Urging the group to leave, Robillard said, "Let's go and I will watch you girls suck and fuck; man I'll beat your ass with a strap" (10-11). At this time all four of them left the bar and proceeded to De Greise's car where he identified himself and placed defendants under arrest (11).

The Defense

Francis Robillard and **Leroy Snowden** testified that several minutes after defendants had entered the bar in question, Patrolman De Greise approached Robillard and asked him for a cigarette light (23). De Greise stated he had just come from another bar where he had not seen anyone that looked good to him (23). After engaging defendants in conversation about various bars, he invited them to his apartment for a drink (23, 34). Robillard replied that he was so tired that he was going home shortly (23). De Greise renewed his invitation several times and finally, Wrenn said that he would go if Robillard came (23, 34). The officer persisted, until Robillard assented (24). All four left the bar (24, 45).

Outside, De Greise insisted that they use his car, stating "We'll only be a few minutes and I will drive you right back to your car" (24, 34). Assenting, the defendants began walking to De Greise's car when suddenly they were placed under arrest.

POINT I

The petition should be dismissed as to petitioners Robillard and Snowden.

In *St. Pierre* v. *United States*, 319 U. S. 41, 42-3 (1943), this Court, in dismissing a certiorari petition, held:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the terms of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

Under the criteria of *St. Pierre*, the petition is moot as to two petitioners, Robillard and Snowden. In September, 1965 they were sentenced to serve thirty days in the Workhouse, execution of which was suspended. For the next six months, the maximum time for which petitioners could have been sentenced [New York Penal Law §723], the sentencing court could have revoked the suspended sentence and imposed a prison sentence [New York Code of Crim. Proc. §470-a]. Now, the six months having run

and the sentencing court thus having no power over petitioners Robillard and Snowden, their petition is moot unless they show legal "disabilities" flowing from the judgment [*St. Pierre,* supra at 43; see *Fiswick et al.* v. *United States,* 329 U. S. 211, 222 (1946)]. Petitioners allege no such disabilities nor could they, for neither New York nor federal law imposes any further penalty upon conviction of the offense in question. Clearly then, Robillard's and Snowden's petition is moot and should therefore be dismissed.

POINT II

The petition does not present a substantial federal question.

a. The People introduced evidence on all elements of the crime.

Straining to propel the non-federal question of sufficiency of evidence into a federal question, petitioners contend that the People introduced no evidence whatsoever on an essential element of the crime, and this deficiency constitutes a denial of due process under *Thompson* v. *Louisville,* 362 U. S. 199 (1960). This Court has always regarded quantum of proof as a state issue, devoid of any federal question. Slightly limiting that well-established rule, the Court, in *Thompson* v. *Louisville,* 362 U. S. 199 (1960), held that a conviction totally lacking evidence—a situation that the Court considered rare—violates due process. However, the present case is clearly not one of those rare instances warranting an excursion into the state's ruling on quantum of proof, for the People introduced evi-

dence on all elements of the crime. Petitioners' unfounded contention rests on their complete failure to comprehend the statute in question.

The offense of disorderly conduct under Section 722 of the New York Penal Law has two essential elements of proof: (1) that defendant committed an act falling within one of twelve subdivisions of the statute; (2) that defendant acted "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned." Acknowledging the People's proof of the first element—that petitioners solicited another to commit a crime against nature [Subdivision 8], they direct their allegation of lack of proof to the second element.

The nature of the proof necessary to satisfy the disputed element of the statute has been well-defined by the highest court of New York. In determining whether there is evidence to support a state conviction, this Court, of course, is bound by the state's own interpretation of the statute in question [*Garner* v. *Louisiana*, 368 U. S. 157, 166 (1961)]. In *People* v. *Monnier*, 280 N. Y. 77 (1939), the New York Court of Appeals construed an act "whereby a breach of the peace may be occasioned" to mean that breach of the peace "might reasonably be expected * * * to flow from such conduct." Elaborating on this objective, rather than subjective nature of the conduct proscribed by the statute, the Court of Appeals, in *People* v. *Harvey*, 307 N. Y. 588 (1954), stated:

> "Common sense * * * dictate[s] that language or conduct is to be adjudged to be disorderly, not merely because it offends some supersensitive or hypocritical individual, but because it is, by its nature, of a sort

> that is a substantial interference with (our old friend) the reasonable man."

Thus, the disturbance potential of conduct in question clearly is not to be determined from the standpoint of the particular complainant—whether private citizen or police officer—but by the norm of the "reasonable man."

This construction fully accords with the New Hampshire Supreme Court's interpretation of that state's breach of the peace statute, which so defined, was unanimously upheld by this Court as a valid exercise of the police power [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573 (1942)]. The New Hampshire high court had held that the test of whether words tended to breach the peace:

> "'is not to be defined in terms of what a particular addressee thinks * * * The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight'" (*id.* at 573)

And, no less true in the present case than in *Chaplinsky* is the fact, noted by the Court there, quoting approvingly the New Hampshire Supreme Court's opinion:

> "'The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. * * * Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. * * * The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, of peace by the speaker—including "classical fighting words," words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats'" [*id.* at 573].

The words deemed "plainly likely to cause a breach of the peace by the addressee" in *Chaplinsky* were defendant's assertion to complainant that he was "a God damned racketeer" and "a damned Fascist" [*id.* at 569]. Surely, as likely to stir the "reasonable man" [*People* v. *Harvey, supra* at 593], possessed, as he is, of "common intelligence" [*Chaplinsky, supra* at 573], to disturb the peace was petitioners' concerted effort to solicit him for the purpose of committing a homosexual act. Public solicitation, degrading the addressee and implying, as it does, that the addressee is a pervert, constitutes no less than "fighting words." And even more likely is a breach of the peace where, as here, the addressee is solicited not merely for a homosexual act, but for a grotesque sado-masochist orgy, clearly recognizable "'by the insult it offers, invariably, to sex, and the human spirit'" [*Mishkin* v. *New York,* 383 N. Y. 503, 506, n. 4 (1966), (quoting D. H. Lawrence, *Pornography and Obscenity* [1930])].

Of course, under the rule of *Thompson* v. *Louisville, supra,* the question here is not the sufficiency, but merely the existence of evidence as to the likelihood of breach of the peace resulting from petitioners' conduct. To contend, as do petitioners, that their perverse behavior was utterly devoid of likelihood to cause a breach of the peace is unrealistic and conflicts with this Court's considered view that utterance of certain words may reasonably be expected to cause a disturbance.

b. No constitutional question is raised by petitioners' claim of police entrapment

This Court has never accorded Constitutional status to the defense of entrapment. As petitioners acknowledge, the rules postulated in *Sorrells* v. *United States*, 287 U. S. 435 (1930) and *Sherman* v. *United States*, 356 U. S. 369 (1958), the two leading decisions on entrapment, were exercises of the Court's supervisory jurisdiction over the administration of criminal justice in the federal courts [*Sorrells, supra* at 450-51; *Sherman, supra* at 380-81 (concurring opinion, Frankfurter, J.); see *Banks* v. *United States*, 258 F. 2d 318 (9th Cir.), *cert. denied* 358 U. S. 886 (1958)]. Thus, since petitioners' claim of entrapment clearly lacks constitutional dimension, it is inadequate basis for granting the writ of certiorari [28 U. S. C. §1257 (3)].

Lacking constitutional mandate, the defense of entrapment has not been recognized by the New York courts.* It should be noted in passing, however, that should facts showing police conduct as egregious as that condemned in *Sorrells* and *Sherman* come before the New York courts, in all likelihood a conviction would be barred, perhaps on grounds of failure of proof of *mens rea*.

However, so remote from the opprobious police behavior condemned in *Sorrells* and *Sherman* is the police activity in the present case, that even if the stringent tests

* It does, however, become an affirmative defense in New York under the Revised Penal Law, Section 35.40, enacted by L. 1965, ch. 1030, eff. September 1, 1967.

promulgated in those supervisory decisions were applied here, the defense would be indisputably unwarranted.

Defining the permissible scope of police activity, the Court, in *Sherman,* stated that "Criminal activity is such that stealth and strategy are necessary weapons in the arsenel of the police officer" [*id.* at 372]. And, in *Sorrells,* the Court said that if government agents "merely afford opportunities or facilities for the commission of the offense," the prosecution is not defeated [*Sorrells, supra* at 441]. The defense is available only when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they might prosecute" [*Sorrells, supra* at 442].

However, the "inducement" permitting the defense of entrapment must be more than mere suggestion or invitation to commit a crime [*Sorrells, supra* at 441, 452; see *United States* v. *Place,* 263 F. 2d 627 (2 Cir. 1959); *Shaw* v. *United States,* 151 F. 2d 967 (6 Cir. 1945); Note, *Entrapment,* 73 Harv. L. Rev. 1333, 1336 (1960)]. As the Court succinctly stated in *Sorrells,* the defense must show that "The agent *lured* defendant, otherwise innocent, to its commission [the crime] by *repeated* and *persistent solicitation*" [*Sorrells, supra* at 441 (emphasis added)].

Furthermore, even if the defendant establishes "inducement," the government may overcome the defense of entrapment by proving defendant's "predisposition" to commit the crime [*Sorrells, supra* at 451; see *United States* v.

Becker, 62 F. 2d 1007, 1008 (2d Cir. 1933) (L. Hand, J.)]. A defendant's "ready complaisance" to commit the crime evinces such predisposition [*Sherman, supra* at 375; *United States* v. *Becker, supra* at 1008].

Wholly absent in the present case is the "persistent and repeated solicitation" present in *Sorrells* and *Sherman*. Petitioners, the "instigators" [*Sorrells, supra* at 452] of the illicit act from the outset, initiated contact with the arresting officer when Robillard walked over to him in a "very crowded" bar, asked for a cigarette light, and then introduced him to his companions Snowden and Wrenn (9, 17). Then, after an innocuous five minute conversation devoid of any conversation concerning sex, all three petitioners sought to engage the officer as the subject of a sado-masochistic orgy (10). Rapidly working to secure his acquiescence, they accompanied boasts of their prowess in performing acts of perversion with physical advances on the officer (10). Thus, petitioners' criminal conduct, far from "the product of the creative activity" of the police [*Sorrells, supra* at 451], was clearly self-induced, and the officer, garbed in plainclothes, "merely afforded the opportunity" for petitioners' commission of a criminal act [*Sorrells, supra* at 441].

Moreover, even assuming, incorrectly, that the officer's conduct did induce petitioners to commit the crime, nevertheless, the defense of entrapment was overcome by the "ready complaisance" they manifested. Only five minutes after they first met the officer, petitioners solicited this stranger for a homosexual act. In sharp contrast is the defendants' stout resistance to government inducement in

Sorrells and *Sherman;* that resistance, the Court held in those cases, rebutted the prosecutions' claim of defendants' readiness to commit the crimes in question. In the former case, defendant consented to illegally sell liquor to a government agent—an old war friend—only after one hour of persistent requests made by the agent during the course of a social visit to defendant. Similarly in *Sherman,* a government agent whom defendant believed to be a fellow narcotics-withdrawal patient, for several months implored defendant to sell him narcotics before he finally succumbed and committed the illicit act. In the instant case, however, far too soon and too spontaneous were the petitioners' alleged seducement to merit acquittal as "unwary innocent[s]" [see *Sherman, supra* at 372].

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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